defence story of incapacity. In our view this ground of appeal must be dismissed.

We would therefore dismiss the appeal and confirm the conviction and sentence.

Appeal dismissed.

PUBLIC PROSECUTOR v. CHUAN KEAT CHAN LTD.

[F.C. (Ong C.J., Gill and Ong Hock Sim F.JJ.) March 14, 1973]

[Ipoh — Federal Court Criminal Reference No. 5 of 1972]

Road Traffic — Failure to carry attendant at rear of vehicle — Condition of licence — Road Traffic Ordinance, 1958, ss. 119 and 120(2).

In this case the respondent had originally been convicted for a breach of a carrier's licence for not carrying an attendant in the rear of the vehicle. The appeal of the respondent was allowed by the High Court, ([1972] 2 M.L.J. 57). The Public Prosecutor thereupon referred the following question to the Federal Court: "Whether failure to comply with the following condition in a carrier's licence granted by the Road Transport Licensing Board constitutes an offence under section 120(2) of the Road Traffic Ordinance, 1958: 'An attendant shall be carried in the rear of the vehicle, so placed that he can signal to overtaking traffic, and to the driver of the vehicle the approach of such traffic'."

Held, failure to comply with the condition constituted an offence under section 120(2) of the Road Traffic Ordinance.

FEDERAL COURT.

Gunn Chit Tuan (Senior Federal Counsel) for the appellant.

Respondent unrepresented.

Ong C.J.: On February 18, 1970 a motor-lorry operating under a "C" Carrier's Licence was observed by the Highway Patrol along the Ipoh-Kampar Road, without a lorry attendant as required under Condition 6 of the licence, which reads: —

"6. An attendant shall be carried in the rear of the vehicle, so placed that he can signal to overtaking traffic, and to the driver of the vehicle the approach of such traffic."

The owner was charged for breach of this condition as an offence punishable under section 120(2) of the Road Traffic Ordinance 1958 and the driver for abetment of such offence. They were duly convicted in the Magistrate's Court at Kampar and fined the sum of $40 and $30 respectively. Their appeal was allowed by the judge of the High Court at Ipoh and on an application by the Public Prosecutor the following question was referred to the Federal Court as raising a question of law of public interest, namely — "Whether failure to comply with the following condition in a Carrier's Licence granted by the Road Transport Licensing Board constitutes an offence under section 120(2) of the Road Traffic Ordinance 1958:

'An attendant shall be carried in the rear of the vehicle, so placed that he can signal to overtaking traffic, and to the driver of the vehicle the approach of such traffic'."

As the High Court decision given on May 8, 1972 caused all prosecutions for similar alleged offences to be held in abeyance throughout the country, we gave our decision, which was a reply in the affirmative, after hearing arguments on both sides, forthwith on January 29, 1973. We now state the grounds of our decision, which was unanimous.

Section 118(1) of the Ordinance empowers the Licensing Board in its discretion to grant or refuse an application for a haulage licence, or a variation of such licence or the conditions thereof. Sub-section (2) goes on to provide that the Board, in exercising its discretion under the section "shall have regard primarily to the interests of the public generally" — on which point the learned judge hearing the appeal said in his judgment: —

"Any condition in the licence which safeguards or secures the public interest is therefore within the ambit of the powers of the Licensing Board."

With this view we entirely agree. But then he went on to explain why he had to quash the conviction and gave the following reason: —

"I have been unable to find any law which requires an attendant to be carried on a goods vehicle. I asked both the learned deputy and the appellant's counsel if there in fact was a law which required an attendant to be carried on a goods vehicle and I have been assured that no written law exists to that effect in our country. The learned deputy, however, qualified his statement by saying that it is only by implication and by virtue of the condition imposed in the licence that an attendant is required on a goods vehicle. An attendant is a person who owes a duty of service to another or is one who attends, i.e., waits to serve. It appears that no rules have so far been made prescribing the duties of an attendant. It was a matter for the rule making authority to prescribe rules defining the duties of attendants on goods vehicles. As they do not seem to have thought it fit to make such rules, my duty is to interpret and enforce the law as it exists and not as it ought to be."

The failure of the Board to make rules prescribing the duties of attendants, in the view of the learned judge, had this legal effect: —

"The power vested in the licensing authority under section 119 to attach a condition to the licence is meant to serve the purpose of 'securing' as far as section 119(iv)(e) of the Road Traffic Ordinance is concerned, the safety and convenience of all road users. The condition has to be related to the purpose and if it is divorced from the purpose or is incapable in its context to serve the purpose for which alone the power to fasten a condition is conferred on the Licensing Board, the condition so imposed is outside the scope and ambit of the authority which the Legislature intended to confer on the Licensing Board and is to that extent invalid. In the absence of any legislation or rules prescribing the duties of attendants, condition No. 6 in the context in which it appears in the licence granted to the first appellant can in no way be said to promote or ensure public interest for the safety and convenience of those who try to overtake the goods vehicles."

With the greatest respect, we do not think that there is any *lacuna* in the law by reason of the Board making no rules governing attendants. Section 119 of the Ordinance provides for conditions which may be attached to licences and under paragraph (e) of sub-section (iv) thereof the Board was given express powers, in relation to all licences (which include the licence in the instant case) to attach conditions for securing that "the safety and convenience of passengers on vehicles and persons on roads shall be promoted." Condition 6, as is widely known, has been attached to haulage licences for many years in its present form. Clearly it was a practical safety measure aimed at

serving the public interest. The object of the condition is perfectly clear. The minutiae of rules governing *the duties* of attendants had been entirely obviated by the very words of Condition 6, which sets out in clear terms the purpose of having attendants on lorries and the two duties they are intended to perform.

The strait-laced interpretation of the law, which was the view of the High Court, is in our opinion iconoclastic and erroneous. We accordingly gave our answer to the reference in the affirmative.

We should, however, like to add a rider; we do not think it right or proper or that it serves any purpose for the driver carrying out or disobeying the instructions of his employer also to be prosecuted. The principle to be applied is *respondeat superior* and it is true to say that invariably the employer has been paying his driver's fine. The only possible exception would be where the driver takes out a vehicle for his own private gain, using it without the owner's knowledge, consent or connivance; in which case, the proper person to be prosecuted should be the driver himself and no reflection cast on the owner if by evidence produced, he can exonerate himself.

Answer in the affirmative.

BONG NYI MOI v. NARAYANASAMY & ANOR.

[F.C. (Ong C.J., Gill and Ali F.JJ.) March 14, 1973]

[Kuala Lumpur — Federal Court Civil Appeal No. 78 of 1972]

Negligence — Finding of fact by trial judge — Statement to police — Admissible to impeach credit of witness.

The appellant's husband was killed in a collision between his scooter and a lorry driven by the first respondent. On the evidence the trial judge found that the lorry driver was not to blame and he dismissed the claim of the appellant. The appellant appealed and contended that in the light of the conflicting evidence the findings of the trial judge were not supported by the evidence.

Held, dismissing the appeal (Ong C.J. dissenting): in this case the appellate court should not interfere with the findings of the trial judge who had seen and heard the witnesses and made his findings thereon.

Cases referred to:-

(1) *Goh Beng Seng* v. *Dol bin Dolah* [1970] 2 M.L.J. 95.

(2) *Ooi Choon Lye* v. *Lim Boon Kheng & Ors.* [1972] 1 M.L.J. 153.

FEDERAL COURT.

David S. H. Tay for the appellant.

Abdul Razak bin Datuk Abu Samah (Senior Federal Council) for the respondents.

Ong C.J.: At about 4.30 p.m. on September 28, 1970 on the Karak-Bentong road, the deceased Chong Huat was riding his Vespa scooter when he collided against the rear off-side of a Jabatan Kerja Raya lorry driven by the first defendant, Narayanasamy, coming from the opposite direction around a right-hand bend. The bend was described as "gentle", but it would appear from the photographs that visibility of vehicular traffic approaching each other from opposite sides of this bend would be no more than 40 to 50 yards. The impact had shorn off the deceased's entire cranium which was found subsequently on the lorry's side of the road 4 feet 6 inches from the grass verge. The deceased's corpse, motor-scooter, mudguard and two lumps of his brain, however, were all scattered on the deceased's side of the road. Such, in brief, was the material evidence on which the deceased's widow based her claim for damages against the defendants, on the ground of negligent driving by Narayanasamy.

Conflicting evidence was given by the only two available eye-witnesses. They were Yong Soon Tiam, a friend of the deceased, who was riding his motorcycle a short distance behind the deceased, and Narayanasamy, the lorry driver. The learned trial judge gave little or no weight to their oral evidence and in his judgment accepted as the plain unvarnished truth a statement given by Yong Soon Tiam to Police Inspector Ramalingam, wherein it was said that, as the deceased was negotiating the bend "his Vespa went into the centre of the road and could have even passed into the other half of the road". On this point the judge said in his judgment: —

"As Mr. Tay says, the crux of the matter is: where was the point of impact? If the collision took place on the Vespa's side of the road, then clearly the lorry driver was to blame for the accident. Having given this matter very anxious thought, I regret having to conclude that it is more probable than not that the collision took place on the lorry's side of the road. I say so mainly because of what P.W.1 (Yong Soon Tiam) told the police about 5½ hours after the accident .... I am also influenced by the fact that when giving evidence P.W.1 first said in examination-in-chief that as the deceased was negotiating the bend he went to the centre of the road, but immediately thereafter corrected himself and said that the deceased went near the centre of the road. The fact that he at first said that the deceased went to the centre of the road made me wary of his evidence.

The fact that the things mentioned by Mr. Tay were all found on the deceased's side of the road can in my opinion be explained by the fact that the *deceased must have hit the rear off-side of the lorry* in a glancing way so that after impact they ricocheted forward and to the left, and on the fact that part of the deceased's skull was found on the lorry's side of the road can be explained in my opinion in this way — probably after the impact it somehow got attached to the lorry and was pushed back towards Karak and fell on to the road.

I would therefore dismiss this suit with costs".

In this appeal the appellant's contention is that, according to the evidence, the learned trial judge ought to have found the lorry driver to blame for the collision *in toto* or at least in part.

I must say that, upon perusal of the judgment, I found myself at the start in complete agreement therewith. After hearing the argument of counsel for the appellant, however, and upon closer critical examination of the evidence, I have come to the conclusion that this clearly is a case where the blame was not all on one side, but should have been apportioned. I shall now set out why I would have held the lorry driver partly to blame.

In the first place it will be noted that the sketch plan showed the centre line not equidistant from both sides of the road at the scene of the accident. Of its total width of 22 feet 6 inches, the lorry's half measured exactly 10 feet 5 inches. The lorry was 7 feet 9 inches wide and 15 feet 9 inches in length. Now, Narayanasamy had said in his evidence that he